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Supreme Court, U.S.
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No. ——

In The
Supreme Court of the United States

MELISSA AMSCHWAND, individually and on behalf of the Estate of Thomas Amschwand,
Petitioner,

v.

SPHERION CORP., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that a participant in or beneficiary of a covered plan may bring a civil action to enjoin violations of ERISA or of the plan or "to obtain other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). The question presented is whether the court of appeals erred in holding that *equitable relief* in this statute does not include make-whole relief equal to the insurance benefits to which a plan beneficiary would have been entitled but for a plan fiduciary's breach of fiduciary duty.

PARTIES TO THE PROCEEDINGS

Petitioner is Melissa Amschwand, individually and on behalf of the Estate of Thomas Amschwand. Respondents are Spherion Corp., individually and as plan administrator of the group life policies 779407-10-001 and 779407-11-001; Group Plan Life Policies 779407-10-001 and 779407-11-001; Trustees of the Interim Health Benefits Trust Group Life Plan; and Group Life and Accidental Death and Dismemberment Insurance Plan.

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PETITION FOR A WRIT OF CERTIORARI

Melissa Amschwand, individually and on behalf of the Estate of Thomas Amschwand, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting respondents' motion for partial summary judgment (App., *infra*, 26a to 42a) is unreported. The opinion of the court of appeals affirming the district court (App., *infra*, 1a to 14a) is reported at 505 F.3d 342.

JURISDICTION

The court of appeals entered its judgment on October 18, 2007, and denied Petitioner's petition for rehearing on November 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case turns on the meaning of *equitable relief* in § 502(a)(3) of ERISA, which provides:

> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the

> plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a)(3) (§ 1132 is set out in full at App., *infra*, 44a to 58a).

STATEMENT OF THE CASE

1. The facts of this case are simple and stark. Mr. Amschwand was a Spherion employee who had been diagnosed with angiosarcoma, a rare and deadly form of cancer, and who expected to die. In 2000, while Mr. Amschwand was on medical leave, Spherion decided to replace Prudential with Aetna as the life insurer under its employee benefit plan. The new Aetna policy included a "special provision" entitled the "Active Work Rule": "If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day."

Spherion, as plan administrator and a named plan fiduciary, repeatedly assured Mr. Amschwand that he was covered under the Aetna plan and that he was entitled to the same benefits under it as under the Prudential plan. No one ever told Mr. Amschwand about the Active Work Rule. Indeed, Spherion repeatedly refused to provide Mr. Amschwand with the plan documents that would have put him on notice of this rule, claiming that these documents were "not yet available" or simply failing to respond to Mr.

Amschwand's requests altogether. It is undisputed that had Mr. Amschwand been aware of the Active Work Rule he could and would have complied with it. Because of Spherion's assurances, however, Mr. Amschwand never worked the one full day required by the Active Work Rule to trigger his Aetna coverage. And, sure enough, when he died in February 2001, Aetna relied on the Active Work Rule to deny coverage — declining to waive the rule, as it had done for all other employees affected.

Petitioner, Mr. Amschwand's widow, sued Spherion seeking, in part, "monetary losses caused by [Spherion's] breach of fiduciary duty" — that is, the life-insurance benefits she lost on account of Spherion's failure to tell Mr. Amschwand about the Active Work Rule, its failure to give him the documents that would have put him on notice of that rule, and its affirmative misrepresentations that Mr. Amschwand was covered under the Aetna plan. The United States District Court for the Southern District of Texas (Judge Ewing Werlein, Jr.) had jurisdiction under 28 U.S.C. § 1331. Judge Werlein regarded Petitioner's claim as one for "money damages" and granted Spherion's motion for summary judgment on the ground that "money damages are not available under ERISA § 502(a)(3), which provides only for 'appropriate equitable relief.' 29 U.S.C. § 1132(a)(3)." App. at 31a to 32a. The United States Court of Appeals for the Fifth Circuit (Chief Judge Edith H. Jones and Judges Fortunato P. Benavides and Carl E. Stewart) affirmed.

Both the district court and the court of appeals thought themselves constrained to deny Petitioner

relief under this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atlantic Medical Services, Inc.*, — U.S. —, 126 S. Ct. 1869 (2006). Judge Benavides' special concurrence in the Fifth Circuit — which Petitioner here quotes in full — captures what took place below:

> The facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available. I am constrained to join the court's opinion, which I find correctly applies controlling precedent.

App. at 14a; *see also* App. at 2a ("Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), we must deny relief.") (Jones, C.J.); App. at 33a to 40a (holding relief foreclosed by *Mertens* and *Great West*).

The sole issue presented by this appeal — and the issue upon which Petitioner's entire case below turns — is whether her claim for monetary losses caused by Spherion's breach of fiduciary duty is, contrary to the Fifth Circuit's holding, a claim for equitable relief under § 1132(a)(3).

2. a. "ERISA's comprehensive legislative scheme includes an integrated system of procedures for its enforcement. This integrated enforcement mechanism, ERISA § 502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA, and essential to Congress' purpose

of creating a comprehensive statute for the regulation of employee benefit plans." *AETNA Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (internal quotations and citations omitted). For this reason, § 1132(a) has broad preemptive effect: "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Id.* at 209. Unless ERISA provides a remedy for a plan fiduciary's breaches of fiduciary duty, no such remedy exists.

The Fifth Circuit's decision in this case is inconsistent with Congress's intent to create a comprehensive and sensible remedial scheme for the enforcement of ERISA because it creates an inexplicable gap in that scheme. Had Spherion violated the terms of the plan, Petitioner could have sued to recover the benefits due her under § 1132(a)(1)(B) ("A civil action may be brought—(1) by a participant or beneficiary— * * * (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."). Had Spherion's breach of fiduciary duty harmed the plan or if the remedy for its breach would flow to the plan, Petitioner could have sued under § 1132(a)(2) ("A civil action may be brought— * * * (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."). *See* 29 U.S.C. § 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan

resulting from each such breach * * * and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.").

Because, instead of violating the terms of the plan, Spherion deceived Mr. Amschwand into failing to comply with the plan, Spherion escapes liability under § 1132(a)(1)(B). And because Spherion injured Petitioner directly, rather than through her interest in the plan, that is, because Spherion's breach relates to immediately payable benefits rather than future benefits, Spherion escapes liability under § 1132(a)(2). But these two facts — (1) that the breach of fiduciary duty consisted in deceit about plan terms rather than a violation of plan terms and (2) that the lost benefits are immediately payable instead of payable in the future — cannot serve as the basis for any sensible distinction. Whether the breach of fiduciary duty constitutes deceit about plan terms or a violation of plan terms and whether a breach results in lost benefits that are immediately payable or payable in the future, the result should be the same. The Fifth Circuit's decision makes these facts matter when they shouldn't.

This result, because it is inconsistent with the intent of Congress to erect a comprehensive and sensible remedial scheme, should not be permitted unless it is required by ERISA's text or this Court's prior decisions. It is not.

b. Neither ERISA's text nor this Court's prior decisions interpreting § 1132(a) require the result that the Fifth Circuit reached. Indeed, properly carried out,

the analysis required by this Court's prior decisions leads to the opposite conclusion: that Petitioner may sue under § 1132(a)(3). This is because the relief that Petitioner seeks — Spherion's making whole the monetary losses its breach of fiduciary duty caused her, namely, the life-insurance benefits that she lost because, as a result of Spherion's deceit, Mr. Amschwand did not satisfy the Active Work Rule -- is within the meaning of *equitable relief* as that term is used in § 1132(a)(3). Make-whole relief in the amount of Petitioner's lost life-insurance benefits is equitable relief because, in the days of the divided bench, Spherion's breach of fiduciary duty would have given Petitioner a cause of action in equity and Petitioner has satisfied all the special conditions, including the absence of any equitable defenses, that equity attached to the award of make-whole relief.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (money damages against non-fiduciary not equitable relief), and *Great-West Life & Annuity Insurance Co v. Knudson*, 534 U.S. 204 (2002) (restitution at law, as opposed to restitution at equity, not equitable relief), this Court held that *equitable relief* in § 1132(a) is limited to "those categories of relief that were *typically* available in equity," *Mertens*, 508 U.S. at 256. The clearest statement of what this requirement means is in Chief Justice Roberts's opinion for the unanimous Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006) (restitution at equity is equitable relief).

In *Sereboff*, the Court explained that an action seeks equitable relief when "the nature of the recovery" and "the basis for [the] claim" are equitable.

Id. at 1874. It is the first of these requirements that is at issue here and that the Court addressed in *Mertens* and *Knudson*. *Mertens* held that money damages sought against a non-fiduciary were not an equitable recovery because they were awarded primarily at law and only on special occasions, such as in the context of beneficiaries' suits for breach of trust over which the equity courts had exclusive jurisdiction, in equity. *Mertens*, 508 U.S. at 255–57.

Mertens concerned a remedy, money damages, that was traditionally legal but occasionally available in courts of equity. Such a remedy cannot be within the meaning of *equitable relief* because, since all legal remedies were occasionally available in courts of equity through the exercise of what we would today call an ancillary or supplemental jurisdiction, including these remedies would elide *equitable* from § 1132(a)(3). *Id.* at 257–58. It does not follow from this, however, that whenever a remedy is available both at law and in equity, it is not within the meaning of *equitable relief*. The same remedy may be available both at law and in equity and yet constitute equitable relief if law and equity attach different conditions to the remedy and the special conditions attached by equity are satisfied.

Sereboff and *Knudson* illustrate this rule. "[O]ne feature of equitable restitution was that it sought to impose a constructive trust or equitable lien 'on particular funds or property in the defendant's possession.' That requirement was not met in *Knudson*, because 'the funds to which petitioners claim[ed] an entitlement' were not in Knudson's possession but had instead been placed in a 'Special

Needs Trust' under California law." *Sereboff*, 126 S. Ct. at 1874 (internal citations omitted) (quoting *Knudson*, 534 U.S. at 207, 213–14). In *Sereboff*, by contrast, the plaintiff did seek specifically identifiable funds within the possession and control of the defendant. Consequently, the "impediment to characterizing the relief in *Knudson* as equitable [was] not present." *Ibid.* *Sereboff* and *Knudson* teach that when a remedy, like restitution, is available both at law and in equity, it constitutes equitable relief if, but only if, the special conditions that equity attaches to it are satisfied: in those cases, the special condition of specifically identifiable funds in the possession and control of the defendant.

Petitioner seeks to be made whole from the monetary losses that Spherion's breaches of fiduciary duty caused. This is a form of relief that, in the days of the divided bench, was available both at law, where it was called money damages, and at equity, where it was part of what was called make-whole relief. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). But, just as in the case of restitution, law and equity attached different conditions to the award of this relief. In addition to the standard equitable defenses, equity attached the condition that the monetary relief be necessary to cure the improper administration of a trust or other relationship giving rise to fiduciary duties. While a suit for this kind of make-whole relief eventually came to be cognizable in law courts in addition to equity courts, money paid to cure the maladministration of a trust was as quintessentially

an equitable remedy as money paid to cure the breach of a contract was a quintessentially legal one:

> In some cases where no questions of accounting or discretion are involved, there has been a tendency to permit the beneficiary to sue the trustee or a third person at law, to recover either a sum due under the trust or damages for a wrongful act. Where no problems of trust administration are involved, the law court at times feels that it can competently adjudge the rights of the parties. The extent of this exceptional aid by the courts of law to the trust beneficiary is difficult to state. The beneficiary is safe in proceeding in equity in all cases. Sometimes, where his right to relief is clear and no construction of the trust or guidance of the trustee is involved, the beneficiary may be able to persuade a court of law to take jurisdiction of his case.

GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 870 (rev. 2d ed. 1995).

So too under the Restatement of Trusts. The Restatement notes Bogert & Bogert's exceptional case: "If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." RESTATEMENT (2D) OF TRUSTS § 198(1) (1959)). But the Restatement goes on to explain that, "Although the beneficiary can maintain an action at law against the trustee as stated in this Section, he has also equitable remedies against

the trustee." *Id.* cmt. a. Under the Restatement, these equitable remedies include "a suit * * * to compel the trustee to redress a breach of trust," *id.* § 199(c), § 199(c) cmt. c, in which the remedies awardable include "any profit which would have accrued to the trust estate if there had been no breach of trust," *id.* § 205. Again, money sought to redress the maladministration of a trustee that harms the trust beneficiary is a quintessentially equitable remedy available only occasionally in a court of law.

When the court's analysis in *Sereboff*, *Knudson*, and *Mertens* is properly applied, the relief that Petitioner seeks qualifies as equitable under § 1132(a). It is at least like the remedy, restitution, at issue in *Sereboff* and *Knudson*: available both at law and in equity, but equitable because the special conditions attached by equity to its provision are satisfied. Indeed, it is really like the inverse of *Mertens*: in *Mertens*, at issue were money damages sought by a non-fiduciary, essentially on a tort claim, a legal remedy occasionally within the ancillary jurisdiction of equity courts; here, at issue is monetary relief sought to make whole damage to a beneficiary arising out of the maladministration of a trust, that is, out of the trustee's breach of fiduciary duties, an equitable remedy occasionally within the expanding jurisdiction of the law courts, but still an *equitable* remedy.

c. Nothing in this argument is inconsistent with the Court's decision or reasoning in *Mertens*. The basis for the Court's reasoning in *Mertens* was that *equitable relief* must not be read so as to elide *equitable* entirely. 508 U.S. at 255–58. Accepting the argument that any relief ever granted in an equity

court is equitable relief would elide *equitable* because of the ancillary jurisdiction of equity courts to award legal remedies in breach-of-trust cases. *Ibid.* But to accept Petitioner's argument is not to accept this argument, for Petitioner argues not that the monetary relief she seeks would be available in *some* case cognizable in an equity court, but that it would be available in *her* case, if brought in an equity court in the days of the divided bench.

Petitioner's argument does not elide *equitable* because it applies only when the plaintiff has satisfied the particular conditions equity attached to awards of money, in this case, that they be part of making whole the damage to a beneficiary caused by the maladministration of a trust. *Equitable* still serves to block cases like *Mertens*, in which the plaintiff does not satisfy the particular conditions equity attaches to awards of money — namely, the condition that the damages be caused by a fiduciary and arise from the maladministration of a trust.

REASONS FOR GRANTING THE PETITION

1. This Court has already granted certiorari on the question presented in this case, *see LaRue v. DeWolff, Boberg & Associates, Inc.*, 127 S. Ct. 2971, 2971 (2007) (granting certiorari); Petition for Certiorari, *LaRue*, *supra*, at i ("The Second Question Presented is: Does § 502(a)(3) permit a participant to bring an action for monetary 'make-whole' relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as 'surcharge')?"), but it did so in a case that also presents a different question, *ibid.* ("The First Question Presented is: Does § 502(a)(3) of

ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?"), that, if answered in favor of the petitioner, moots the question presented in this case. By granting certiorari in Petitioner's case, this Court can assure itself a procedurally unblemished opportunity to address the availability of make-whole relief under § 1132(a)(3).

2. Granting certiorari is appropriate to clarify the nature of the *Mertens–Knudson–Sereboff* test in cases, like this one, that concern remedies available both in courts of law and in courts of equity. On the best reading of these cases, the test is that a remedy qualifies as *equitable relief* even though it was available both in courts of law and in courts of equity if the plaintiff satisfies the special conditions that equity attached to the provision of that remedy. In the specific context of monetary relief, a plaintiff satisfies the special conditions that equity attached if no equitable defenses apply and the monetary relief is necessary to make whole injury caused by the defendant's maladministration of a trust. The perception of the Fifth Circuit and other courts of appeal that monetary relief is *never* equitable relief is inconsistent with Congress's intent to put in place a comprehensive and sensible remedial scheme for ERISA and results from a failure to conduct the more nuanced analysis required by this Court's decisions.

3. The question presented in this case is of unusual national importance because it affects every employee benefit plan governed by ERISA. At issue is whether ERISA provides a remedy — which, because

of ERISA's broad preemptive effect, is to say whether a remedy exists — for a plan fiduciary's deceit of a participant that affects terminal rather than future benefits. Most insurance (as opposed to pension) cases in which there is deceit as to the terms of the policy fit this mold because the deceit is revealed only when payment under the insurance policy comes due. The egregious facts of this case, namely, that Mr. Amschwand did everything he should have done and was nevertheless denied relief by Aetna and, unless this Court steps in, ERISA, highlight the importance of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2007

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20346

[Filed October 18, 2007]

MELISSA AMSCHWAND, INDIVIDUALLY)
AND ON BEHALF OF THE ESTATE OF)
THOMAS AMSCHWAND)
Plaintiff-Appellant)
)
v.)
)
SPHERION CORP; ET AL)
Defendants)
)
SPHERION CORP, INDIVIDUALLY AND)
AS PLAN ADMINISTRATOR OF THE)
GROUP PLAN LIFE POLICIES)
779407-10-001 & 779407-11-001;)
GROUP PLAN LIFE POLICIES,)
779407-10-001 & 779407-11-001;)
TRUSTEES OF THE INTERIM HEALTH)
BENEFITS TRUST GROUP LIFE PLAN;)
)

GROUP LIFE AND ACCIDENTAL)
DEATH AND DISMEMBERMENT)
INSURANCE PLAN)
Defendants-Appellees)
)

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before JONES, Chief Judge, and BENAVIDES and STEWART, Circuit Judges.

EDITH H. JONES, Chief Judge:

This appeal addresses whether, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), "other appropriate equitable relief" permits recovery of extra-contractual, or "make-whole," damages in the form of payment of life insurance benefits that would have accrued to a plan beneficiary but for a plan fiduciary's breach of fiduciary duty. Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), we must deny relief.

I. BACKGROUND

During Mr. Amschwand's medical leave for a bout with cancer that he did not survive, his employer Spherion switched insurance companies, replacing Prudential with Aetna Life Insurance Company ("Aetna") as the new provider of basic and supplemental life insurance benefits under the company Plan. A "special provision" of Aetna's group

insurance policy covering Spherion employees was entitled the "Active Work Rule" and provided:

> If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day.

This provision was expressly noted in the "Summary of Coverage" Aetna prepared for Spherion employees.[1] As part of the transition to the new policy, Aetna and Spherion agreed that the Active Work Rule requirement would be waived for employees like Mr. Amschwand, who were not currently working full-time due to a medical condition that antedated the switch from Prudential to Aetna. For reasons Spherion has failed to explain, however, Mr. Amschwand was not among those who received coverage despite being on disability leave when the Policy took effect on May 1, 2000. Unlike other similarly situated employees, Mr. Amschwand never received a waiver and, unbeknownst to him, he remained subject to the Active Work Rule.

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[1] The Summary of Coverage provision stated: "Active Work Rule: If you happen to be ill or injured and away from work on the date your coverage would take effect, the coverage will not take effect until you return to full-time work for one full day. This rule also applies to an increase in your coverage."

Spherion, an ERISA fiduciary and plan administrator, notified its employees that they could elect to participate in the Aetna Plan during an "open enrollment" period, which commenced in March 2000. Mr. Amschwand duly enrolled and was informed by Spherion that he could maintain his existing $248,000 basic coverage and his $142,000 level of supplemental coverage under the Policy. On November 6, 2000, a representative of Spherion's Human Resources Department orally confirmed to Mr. Amschwand that all of his life insurance was convertible under the Policy and that he remained eligible for all benefits.

As his condition deteriorated, Mr. Amschwand repeatedly contacted Spherion to confirm that he was fully covered under the Aetna Policy. Each time, Spherion representatives failed to mention the Active Work Rule requirement and incorrectly assured him that the full spectrum of coverage he enjoyed under the pre-Aetna Plan remained valid. Moreover, in spite of the Amschwands' repeated oral requests for documentation of the Policy terms and the corresponding Summary of Coverage, Spherion either maintained that informational booklets were not yet available for employees, or simply failed to provide any paperwork describing the conditions of the Policy. Believing himself covered, Mr. Amschwand timely paid the basic and supplemental life insurance premiums while on disability leave until his death in February, 2001. Mr. Amschwand diligently sought to ensure that his wife would be provided for under the Plan. Both parties agree, however, that Spherion never informed him that in order for the Policy to take effect he was required to return to work for at least one full day.

Shortly after her husband's death, Mrs. Amschwand filed a claim with Aetna only to be informed that because her husband had not satisfied the Active Work Rule, he was ineligible for benefits under the Policy. After being denied recovery in Aetna's administrative appeals process, Mrs. Amschwand filed suit seeking relief under ERISA § 502(a)(3) in the form of "monetary losses caused by [the Spherion Defendants'] breach of fiduciary duty."[2] That is, Amschwand sought the equivalent of the combined life insurance benefits that she would have received if her husband had complied with the Active Work Rule. Spherion refunded the premium payments but maintained that the additional demand for money damages did not constitute "appropriate equitable relief' within the meaning of subsection (a)(3). The district court agreed, granting summary judgment for Spherion. The court also dismissed as moot a third-party complaint filed by Aetna. Amschwand appeals.

II. STANDARD OF REVIEW

This court reviews the district court's summary-judgment grant *de novo*, applying the same standard used below. *Chacko v. Sabre, Inc.*, 473 F.3d 604, 609 (5th Cir. 2006). Summary judgment is

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[2] Amschwand already has recovered statutory damages in the amount of $100 per day from the date of Spherion's failure to timely provide policy documentation, as well as attorney's fees, pursuant to ERISA §§ 502(c)(l)(B) and (g)(l), 29 U.S.C. §§ 1132(c)(l)(B), (g)(l), respectively. The present appeal concerns only the availability of a monetary remedy under § 502(a)(3)

appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P56(c).

III. DISCUSSION

Section 502(a)(3) allows a plan participant, beneficiary, or fiduciary to obtain, *inter alia*, "appropriate equitable relief" to enforce the terms or to remedy violations of an employee-benefit plan. The scope and nature of relief available to aggrieved parties under this statutory provision has been circumscribed by a line of Supreme Court decisions beginning with *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993). Analyzing the remedies that were historically available in courts of equity, the Court in *Mertens* held that § 502(a)(3) did not authorize a suit for monetary damages against a nonfiduciary that participated in the plan fiduciary's breach of duty. Despite the fact that monetary damages were among the remedies historically granted by pre-fusion equity courts in actions brought by a beneficiary against a trustee, the Court reasoned that consequential damages were a legal rather than equitable remedy and denied relief. *Id.* at 255-56, 113 S. Ct. at 2068-69. Justice Scalia supported this conclusion by acknowledging that in trust disputes a court sitting in equity could routinely establish "purely legal rights and grant legal remedies" otherwise beyond its equitable jurisdiction. *Id.* at 256, 113 S. Ct. at 2068; see also GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES,

§ 870 (rev. 2d ed. 1995). Congress's use of the term "equitable" in subsection (a)(3), therefore, was construed to encompass only categories of relief "*typically* available in equity," like injunction, mandamus, or restitution. *Id.* at 256, 113 S. Ct. at 2069. Had Congress intended subsection (a)(3) to authorize the panoply of legal remedies sometimes awarded by equity courts, the term "equitable" would become superfluous. *Id.* at 257-58, 113 S. Ct. at 2069-70; *see also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 574 (4th Cir. 2006), *cert. granted*, ___ U.S. ___, 127 S. Ct. 2971 (2007). ("[E]quitable relief connotes only a subset of the full palliative spectrum.") (citation and internal quotation marks omitted). Money damages, *Mertens* concluded, were the "classic form of *legal* relief' and thus not a "typically equitable" remedy available under 502(a)(3). 508 U.S. at 255, 113 S. Ct. at 2068.[3]

The spectrum of § 502(a)(3) relief contracted further in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002). Great-West, a nonfiduciary insurance company, sought an injunction for money damages as restitution against a plan beneficiary, who had violated the plan's subrogation clause by failing to reimburse Great-West for his tort recovery in a lawsuit. Although restitution

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[3] This court has held similarly. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 944 (5th Cir. 1999) (noting that § 502(a)(3) excludes "extra-contractual," "make-whole," and "compensatory" damages); *Weir v. Federal Asset Disposition Ass'n*, 123 F.3d 281, 290 (5th Cir. 1997) (no compensatory or punitive damages available under § 502(a)(3) against a fiduciary in her individual capacity).

was mentioned in *Mertens* as "typically equitable," relief, Justice Scalia clarified in *Great-West* that "not all relief falling under the rubric of restitution is available in equity." 534 U.S. at 212, 122 S. Ct. at 714. The crucial distinction between two historical species of restitution is that equitable restitution seeks only to restore to the plaintiff particular funds or property in the defendant's possession, while legal restitution imposed personal liability for breach of a legal duty. *Great-West* ultimately reaffirms the *Mertens* requirement that the *nature of the relief sought* under § 502(a)(3) be "typically equitable"; it adds a second requirement that the *cause of action giving rise to the claim* be generically equitable as well. Great-West's desired relief was not "equitable" within this interpretation of § 502(a)(3) because under California law a constructive trust or equitable lien cannot be established over funds or property not within a defendant's control.

The freshest of *Mertens*'s progeny, *Sereboff v. Mid Atlantic Medical Services, Inc.*, ___ U.S. ___, 126 S. Ct. 1869 (2006), reinforces the two-part equity test. In *Sereboff*, an injured beneficiary who recovered a tort settlement was sued by the plan fiduciary to recoup medical expenses it had paid on the beneficiary's behalf. But in contrast to *Great-West*, the *Sereboff* beneficiaries retained possession and control of the particular settlement funds that the fiduciary sought. Accordingly, the Supreme Court held that the relief sought by the fiduciary would have been recognized as equitable by a pre-fusion equity court and was subject to the restitutionary remedy of an equitable lien on the settlement funds. *See Sereboff*, ___ U.S. ___, 126 S. Ct. at 1874-75. *Sereboff* seems to confirm that the *sine*

qua non of restitutionary recovery available under § 502(a)(3) is a defendant's possession of the disputed res. *See, e.g., Coan v. Kaufman*, 457 F.3d 250, 264 (2d Cir. 2006) (restitutionary relief is deprived of its equitable character for purposes of § 502(a)(3) "when, as here, the defendants never possessed the funds in question and thus were not unjustly enriched") (citation and internal quotation marks omitted); *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1063 (8th Cir. 2006); *Callery v. United States Life Ins. Co.*, 392 F.3d 401, 406 (10th Cir. 2004); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1011 (9th Cir. 1998).

This appeal, in contrast to the Supreme Court cases, is a suit by a *beneficiary* seeking relief under § 502(a)(3) from a plan fiduciary for breach of fiduciary duty.[4] Amschwand places great weight on the distinguishing fact that Spherion's fiduciary status is "critical because, in courts of equity, make-whole relief was routinely available as a remedy for breach of fiduciary duty in cases brought against fiduciaries." Echoing the methodology of Justice Ginsburg's

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[4] As the pleadings demonstrate, this action can alternatively be characterized as a demand for damages from the breach of Thomas Amschwand's life insurance policy. Contrary to Spherion's insistence, breach of contract, although historically not an action brought in equity, does not put equitable recovery under § 502(a)(3) out of Amschwand's reach. *See Sereboff*, ___ U.S. ___, 126 S. Ct. at 1874 ("ERISA provides for equitable remedies *to enforce plan terms*, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make § 502(a)(3)(B)(ii) an empty promise.").

dissenting opinion in *Great-West* (a rationale resurrected in her concurrence in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488 (2004)), Amschwand argues that the district court misconstrued *Mertens* and *Great-West*, which narrowly held that extracontractual damages against *nonfiduciaries* are not equitable relief cognizable under § 502(a)(3). Against a fiduciary like Spherion, however, money damages are available under § 502(a)(3) because such a claim would have entitled her to equitable restitution in the pre-fusion equity courts.

Anschwand's proposed distinction among defendants has been rejected by many of our sister circuits. There is no textual argument for drawing this distinction under § 502(a)(3). Under *Great-West*, only the nature of the claim and the relief sought — not the status of the litigants — determine the scope of available § 502(a)(3) recovery.[5] *See, e.g., Callery*, 392 F.3d at 409; *McLeod v. Or. Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996) ("the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question whether damages constitute 'appropriate equitable relief" under § 502(a)(3)). That wider relief was traditionally available in equity courts against fiduciaries than nonfiduciaries is irrelevant to ERISA's

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[5] On its face, § 502(a)(3) defines who may bring an action; it does not condition the scope of recovery on the identity of the defendant. This is not true of other ERISA remedial provisions. *See, e.g., Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 352 & 353 n.13 (5th Cir. 2003) (citing statutory sections).

remedial scheme. *Mertens* and its progeny state that § 502(a)(3) relief is affirmatively *not* grounded in "the special equity-court powers available to trusts." *Great-West*, 534 U.S. at 219, 122 S. Ct. at 718; *Mertens*, 508 U.S. at 258, 113 S. Ct. at 2070; *see also Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper Inc.*, 382 F.3d 587, 596 (6th Cir. 2004).

Amschwand further repeats the unsuccessful argument that because monetary damages for breach of fiduciary duty were sometimes awarded against trustees in courts of equity, they are automatically available under § 502(a)(3). *See, e.g., Davila*, 542 U.S. at 223-24,124 S. Ct. at 2504 (Ginsburg, J., concurring) (arguing that ERISA imports general trust principles recognized by equity courts). *Mertens*, however, held that even if breach of fiduciary duty is a generically equitable claim, the remedy sought — here, restitution — must have been one *typically* awarded, not one that *could have been* awarded, by a court of equity. The species of restitutionary relief sought by Amschwand here does not qualify as a "typically equitable" remedy under *Great-West*. Spherion never maintained possession of Amschwand's insurance proceeds, yet possession is the key to awarding equitable restitution in the form of a constructive trust or equitable lien. In contrast, Amschwand seeks relief—whether characterized as make-whole or restitutionary—that is legal in nature because it represents damages on the insurance contract that Spherion allegedly breached.[6] *See LaRue*, 450 F.3d at

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[6] *Cf. Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 309 n.20 (5th Cir. 2007) (legal restitution is not a remedy cognizable under

575 ("absence of unjust possession is fatal to an equitable restitution claim"); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439,445 (5th Cir. (no § 502(a)(3) recovery because settlement proceeds were in the registry of the Mississippi chancery court, not under the defendant's control). Stated otherwise, even were we to find that Amschwand's cause of action sounds in equity, her desired relief is not typically equitable.

A defendant's possession of the disputed res is central to the notion of a restitutionary remedy, which was conceived not to assuage a plaintiffs loss, but to eliminate a defendant's gain. *See, e.g., Great-West*, 534 U.S. at 229, 122 S. Ct. at 723 (Ginsburg, J., dissenting); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wainsbrough*, 354 F.3d 348, 355-56 (5th Cir. 2003). The Courts of Appeals have widely adopted this reasoning. *See, e.g., LaRue*, 450 F.3d at 576 (value of a plaintiffs loss is a "measure that is traditionally legal, not equitable"); *Coan*, 457 F.3d at 264 (restitutionary remedies are based upon a defendant's gain); *Callery*, 392 F.3d at 406 (same); *Bast*, 150 F.3d at 1011 (defendant's "ill-gotten profit" is integral to equitable restitutionary remedies). Thus, if Spherion breached its fiduciary duty to Mr. Amschwand, the appropriate equitable remedy is the disgorgement of Spherion's ill-gotten

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§ 502(a)(3)); *Coan*, 457 F.3d at 264 (attempted recovery of funds allegedly dissipated by fiduciary's mismanagement of a 401(k) plan not actionable under § 502(a)(3)); *Callery*, 392 F.3d at 406 (attempted recovery of life insurance benefits by plan beneficiary who alleged breach of fiduciary duty not cognizable under § 502(a)(3)).

profits, *i.e.*, refund of the policy premiums. *See Lind v. Aetna Health, Inc.*, 466 F.3d 1195, 1200-01 (10th Cir. 2006) (citing *Callery*, 392 F.3d at 406); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481 (6th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944-45 (8th Cir. 1999).

Obtaining the lost policy proceeds, as Amschwand requests, is simply a form of make-whole damage.[7] *Cf. Coan*, 457 F.3d at 264; *Callery*, 392 F.3d at 406. This demand is not equitable in derivation, but is akin to the legal remedies of extracontractual or compensatory damages. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 870 (rev. 2d ed. 1995) (payment of a sum due under the trust or damages for a trustee's wrongful act are legal remedies occasionally granted by an equity court); RESTATEMENT (SECOND) OF TRUSTS § 198(1) (1959) (enforcement of trustee's duty to pay money was an action at law).[8] In contrast to the make-whole

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[7] Amschwand's alternative characterization of the remedy she seeks under § 502(a)(3) as injunctive relief that would preclude Spherion's withholding payment of the make-whole damages is essentially indistinguishable from a demand for payment. Such attempts to recharacterize a desired § 502(a)(3) remedy as a purely equitable form of relief, like an injunction, have been consistently rejected. *See Great- West*, 534 U.S. at 210-11, 122 S. Ct. at 713; *Mertens*, 508 U.S. at 255; 113 S. Ct. at 2068; *Bowen v. Massachusetts*, 487 U.S. 879, 915-16, 108 S. Ct. 2722, 2743 (1988) (Scalia, J., dissenting); *Eichorn v. AT&T Corp.*, 484 F.3d 644, 655 (3d Cir. 2007); *Callery*, 392 F.3d at 405.

[8] This court has explicitly rejected language from our pre-*Mertens* decisions which speculates that such relief could be available

damages sought here, equitable restitution was designed to restore the trust res damaged by a trustee's breach of duty; it did not aim to compensate a beneficiary for expected gains that would have accrued absent a fiduciary's breach. *See* RESTATEMENT (SECOND) OF TRUSTS § 205 (1959). Because the remedy sought here was not typically available in pre-fusion courts of equity, we are obliged to follow the Supreme Court's decision in *Great-West* and deny § 502(a)(3) relief.

IV. CONCLUSION

For the aforementioned reasons, the judgment of the district court is **AFFIRMED**.

BENAVIDES, Circuit Judge, specially concurring:

The facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available. I am constrained to join the court's opinion, which I find correctly applies controlling precedent.

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under § 502(a)(3). *See, e.g., Rogers*, 167 F.3d at 944, *recognizing abrogation of Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992) ("Although our decision in *Corcoran* may have 'left the door open' to the possibility of recovering certain extra-contractual damages necessary to make a plaintiff whole, the Supreme Court firmly closed this door in *Mertens*.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-02-4836

[Filed March 28, 2006]

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND
Plaintiff,

v.

SPHERION CORPORATION, INDIVIDUALLY and as PLAN ADMINISTRATOR, TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN
Defendants,

v.

AETNA LIFE INSURANCE COMPANY,
Third-Party Defendant.

FINAL JUDGMENT

For the reasons stated in the Memorandum and Order entered August 24, 2005, the Memorandum and Order entered March 6, 2006, and the separate Order signed this date that awards reasonable attorney's fees, expenses, and taxable costs, it is

ORDERED and ADJUDGED that Plaintiff Melissa Amschwand, Individually, and on behalf of the Estate of Thomas Amschwand, shall have and recover from Defendants Spherion Corporation, individually, and as Plan Administrator, Trustees of the Interim Health Benefits Trust Group Life Plan, and Group Life and Accidental Death and Dismembership Insurance Plan, the sum of SEVENTY-EIGHT THOUSAND EIGHT HUNDRED FORTY and 13/100 DOLLARS ($78,840.13), plus interest on all unpaid amounts thereof from the date hereof until paid at the rate of 4.77% per annum, compounded annually. (The foregoing sum includes taxable costs to which Plaintiff is entitled, and therefore no separate bill of costs shall be filed.)

All other and further relief sought by any party herein and not expressly granted is DENIED.

This is a **FINAL JUDGMENT**.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas on this 28th day of March, 2006.

/s/
EWING WERLEIN, JR.
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-02-4836

[Filed March 6, 2006]

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND
Plaintiff,

v.

SPHERION CORPORATION, INDIVIDUALLY AND AS PLAN ADMINISTRATOR, TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN
Defendants,

v.

AETNA LIFE INSURANCE COMPANY,
Third-Party Defendant.

MEMORANDUM AND ORDER

Pending is Plaintiff's Second Motion for Summary Judgment (Document No. 152).[1] After having carefully reviewed the motion, the response, the evidence submitted by the parties, and the applicable law, the Court concludes that the motion should be granted.

I. *Background*

The background for this suit and identities of the parties may be found in the Court's Memorandum and Order entered August 24, 2005. Remaining in this lawsuit are Plaintiff's claims for statutory penalties and attorney's fees under ERISA § 502(c)(1)(B) and (g)(1). *See* 29 U.S.C. § 1132(c)(1)(B), (g)(1).[2] Plaintiff alleges that despite numerous requests, Spherion failed to provide to her and her husband copies of the Plan documents that would have alerted them to the Plan's terms for coverage, including the Active Work Rule, which stated: "If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage)

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[1] Also pending are the Spherion Defendants' Objections and Motion to Strike Plaintiff's Summary Judgment Evidence (Document No. 157), to which Plaintiff files no response in opposition. In accordance with Local Rule 7.4, the motion is deemed unopposed. Defendants' objections are meritorious, and the motion to strike is GRANTED.

[2] The parties agree that the issue of attorney's fees should be resolved by way of a fee application after the Court rules on the pending summary judgment motion. *See* Document Nos. 152 at 9; 156 at 1.

would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day." *See* Document No. 104 ¶¶ 15-16, 32, 34-35, 37-38, 41-44, 51, 58. Accordingly, Plaintiff seeks an award of statutory damages in the amount of $100 per day from the date of Spherion's "failure or refusal to send the documents requested by Plaintiff." *Id.*

Although Plaintiff brings the motion pursuant to Federal Rule of Civil Procedure 56, Defendants state in response to the motion that "not all of the material facts are undisputed." Document No. 156 at 1. Nevertheless, Defendants "respectfully request that the Court resolve the instant penalty issue--including all disputed issues of material fact--pursuant to the instant motion," given that a "formal trial or hearing on the issue would be expensive, both to the parties and in terms of the Court's resources, but would add nothing to the presentation of the relevant argument." *Id.* Plaintiff agrees. *See* Document No. 152 at 2.

II. *Discussion*

Section 502(c)(1)(B) of ERISA provides that:

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within

> 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B). "In exercising its discretion to determine whether and what amount of penalty to award the court may consider, among other factors, the prejudice to the plan participant and the conduct of the administrator, as well as the number of requests for compliance made and the length of the delay." *Ferguson v. Vice-President of Human Resources, Volt Mgmt. Corp.*, No. Civ. A. H-00-2104, 2001 WL 34070237, at *5 (S.D. Tex. Aug. 13, 2001) (Lake, J.) (citing *Davis v. Featherstone*, 97 F.3d 734, 738 (4th Cir. 1996); *Ziaee v. Vest*, 916 F.2d 1204, 1210-11 (7th Cir. 1990)).

The uncontroverted evidence is that Plaintiff's father and attorney, Anson Phipps ("Phipps"), made Plaintiff's first written request for Plan documents on July 20, 2001, approximately five months after Mr. Amschwand's death. *See* Document No. 152 ex. 8.[3] On August 24, 2001, Spherion's director of benefits wrote Phipps and purported to transmit the Aetna Life Insurance Plan Certificate, the Canada Life Guide to Benefits, and the Prudential Group Life and Disability Insurance Policy. *Id.* ex. 11. When none of these items

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[3] Although there is evidence that Mr. Amschwand requested but never received copies of the Aetna Policy and/or the applicable SPD before his death, Plaintiff was unable to locate a writing evidencing his requests. Document No. 152 at 2-3.

was enclosed with the letter, however, Phipps made a second request for the applicable Plan documents on September 6, 2001. *Id.* ex. 12; ex. 18 ¶¶ 11-12. On September 13, 2001, Phipps received from Spherion, *inter alia*, an Amendment Sheet for disabled employees prepared by Aetna; Phipps did not, however, receive a copy of the Policy. *See id.* ex. 18 ¶ 14; *see also* Document No. 156 ex. 1. On January 2, 2002, Phipps made a third request for a copy of the Policy. Document No. 152 ex. 14. On March 29, 2002, Spherion responded by sending Plaintiff a copy of the Prudential Group Life and Disability Policy, which, Spherion stated, it had determined was the insurance policy applicable to Mr. Amschwand. *Id.* ex. 17. Spherion did not, however, include a copy of the Aetna Policy. *Id.* ex. 18 ¶ 19.[4]

According to Plaintiff, she did not receive a complete set of the applicable Aetna documents--including the Aetna Policy and the applicable SPD with the Active Work Rule--until Aetna produced them in this litigation on May 8, 2003. *Id.* ex. 24 ¶¶ 4-5. Plaintiff therefore requests that the

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[4] In the letter, Spherion also stated that it was enclosing "all applicable plan documents," including documents covering "the period beginning with Mr. Amschwand's employment through April 20, 2000" and "the period beginning May 1, 2000 through the date of Mr. Amschwand's death." *See* Document No. 152 ex. 17. Spherion suggests that this statement is evidence that it complied with Plaintiff's request for Plan documents. *See* Document No. 156 at 45. The uncontroverted affidavit testimony of Plaintiff and Phipps, however, indicates that whatever documents Spherion sent, they did not include a copy of the Aetna Policy. *See* Document No. 152 ex. 18 ¶ 19; ex. 24 ¶¶ 4-5.

Court assess a statutory penalty against Spherion in the maximum amount of $100 per day for the 656-day period from July 20, 2001--when Plaintiff first requested the Plan documents--to May 8, 2003--when Aetna produced the Plan documents in this litigation--for a total of $65,600. *See* Document No. 152 at 6. Plaintiff contends that such an award is appropriate in this case because: (1) the prejudice suffered by Plaintiff is overwhelming, given that Mr. Amschwand requested the Plan documents before his death and "could have easily shown up to work for one day and been eligible for the death benefits which have now been denied" to Plaintiff; and (2) Spherion "essentially acted with deliberate indifference to its responsibilities" when it failed to meet Plaintiff's requests, particularly since it "made a conscious decision not to deliver plan documents to its plan participants to because of the associated cost in doing so." *Id.* at 7-8.

In response, the Spherion Defendants argue that the Court should decline to impose a penalty because they "attempted in good faith to comply with Plaintiff's requests for Plan documents." Document No. 156 at 4. Defendants admit that "[i]n hindsight it appears that errors may have been made," but Defendants argue that they "did not act in bad faith" or intentionally delay Plaintiff's receipt of the appropriate Plan documents. *Id.* at 5. Defendants further contend that Plaintiff was not prejudiced by their failure timely to provide the Plan documents because all of the alleged prejudice and harm of which Plaintiff complains occurred before Mr. Amschwand's death. *Id.* Given that Plaintiff's receipt of the applicable Plan documents "had absolutely no impact on the merits of

her claim or the outcome of this lawsuit," Defendants argue, any statutory penalty would be inappropriate. *Id.* But should the Court elect to exercise its discretion to impose a penalty, Defendants contend that the amount of the penalty should be substantially less than the $100 daily maximum. *Id.* at 6-7.

After carefully considering the relevant factors, including (1) Plaintiff's repeated attempts to obtain a complete copy of the appropriate and applicable Plan documents from Defendants, (2) Defendants' gross incompetence and neglect in supplying the properly requested documents, (3) testimony of Defendants' former employee that "Spherion was operating like a loose ship when it came to notifying employees of plan changes" and "was not timely or consistent in dispersing the Summary Plan Documents to its employees," *see* Document No. 152 ex. 3 ¶¶ 18, 21, (4) the inexcusable frustration, inconvenience, delay, and expense that Plaintiff necessarily incurred in unsuccessfully attempting to obtain the appropriate and applicable Plan documents from Defendants, and (5) the mitigating factors (i) that no proof has been presented of actual bad faith on the part of Defendants and (ii) that the delays did not affect the viability of Plaintiffs' claims for the life insurance benefits,[5] the Court finds that imposing a statutory penalty in the

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[5] While Defendants' incompetence in responding to Mr. Amschwand's survivors did not affect the viability of the claim for policy proceeds, it is likely that the same kind of incompetence on the part of Defendants served to withhold from Mr. Amschwand advice regarding the requirement that he return to work for one full day, which he could have done, to obtain full coverage of $426,000 in life insurance proceeds on his life.

amount of $85.00 per day for 656 days is appropriate to the total circumstances.

III. Order

Accordingly, it is

ORDERED that Plaintiff Melissa Amschwand's Second Motion for Summary Judgment (Document No. 152) is GRANTED, and the Spherion Defendants shall pay to Plaintiff a statutory penalty in the amount $55,760.00. It is further

ORDERED that within the next fourteen (14) days the parties shall confer in good faith to reach agreement on the fair and reasonable amount of attorney's fees that should be awarded to Plaintiff in connection with prosecuting her claim for statutory damages. The Court believes that the parties can agree on this issue. If not, then the parties shall file a joint report so advising the Court no later than 21 days after the entry of this Order. The Court will thereafter--if necessary--set a briefing schedule on the attorneys' fees issue.

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 6th day of March, 2006.

/s/
EWING WERLEIN, JR.
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-02-4836

[Filed August 24, 2005]

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND
Plaintiff,

v.

SPHERION CORPORATION, INDIVIDUALLY and as PLAN ADMINISTRATOR, TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN
Defendants,

v.

AETNA LIFE INSURANCE COMPANY,
Third-Party Defendant.

MEMORANDUM AND ORDER

Pending are the following: Defendants Spherion Corporation's, Trustees of the Interim Health Benefits Trust's, and the Group Life and Accidental Dismemberment Insurance Plan's Motion for Partial Summary Judgment (Document No. 127); Plaintiff Melissa Amschwand's [Cross] Motion for Partial Summary Judgment (Document No. 131); and Third-Party Defendant Aetna Life Insurance Company's Motion for Summary Judgment on Third-Party Complaint (Document No. 124).[1] After having carefully reviewed the motions, responses, replies, and the applicable law, the Court concludes as follows:

I. *Background*

This case arises under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq. Plaintiff Melissa Amschwand ("Plaintiff") brings suit against Defendants Spherion Corporation ("Spherion"), Trustees of the Interim Health Benefits Trust (the "Trustees"), and the Group Life and Accidental Dismemberment Insurance Plan (the

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[1] Also pending is Defendants Spherion Corporation's, Trustees of the Interim Health Benefits Trust's, and the Group Life and Accidental Dismemberment Insurance Plan's Motion to Strike (Document No. 140), in which Defendants lodge a large number of objections to Plaintiff's summary judgment evidence. Virtually all of these objections are without merit, but because the Court concludes that Defendants are entitled to summary judgment even if Plaintiff's challenged evidence is considered, the motion to strike will be DENIED AS MOOT.

"Plan") (collectively, "Spherion Defendants" or "Defendants") in an effort to recover the value of basic and supplemental life insurance benefits that Plaintiff contends she would have received under the Plan but for a breach of fiduciary duty by Spherion, the former employer of Plaintiff's late husband Thomas Amschwand ("Mr. Amschwand").[2]

Mr. Amschwand began working at Spherion in February 1998.[3] At that time, Mr. Amschwand participated in the Plan, a life insurance plan established and maintained by Spherion and insured through a group life insurance policy issued by Prudential Life Insurance Company of America ("Prudential"). Document No. 104 ¶ 14. On August 12, 1999, Mr. Amschwand was diagnosed with cardiac angiosarcoma, a rare form of heart cancer. *Id.* ¶ 10.

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[2] Although Plaintiff initially sued Aetna Life Insurance Company ("Aetna"), the insurer of Spherion's life insurance Plan, Plaintiff voluntarily dismissed Aetna from the lawsuit in October, 2004. *See* Document No. 100. Plaintiff evidently determined that her husband did not meet Aetna's conditions for coverage prior to his death. *See* Document No. 131 at 11-12. Defendants then filed a third-party complaint against Aetna, alleging that "[i]n the event the Spherion Defendants (or any of them) are found liable to Plaintiff, then Aetna should be held liable to the Spherion Defendants for all such liability." Document No. 120 ¶ 11.

[3] According to Plaintiff, Mr. Amschwand was actually hired by Spherion's predecessor, a company called Anatec. Document No. 104 ¶ 9. Anatec was purchased by Norrell Information Services ("Norrell") in July, 1998, and a year later, Norrell was purchased by Interim Technology Consulting, who changed Norrell's name to Spherion in July, 2000. *Id.*

Due to his illness, Mr. Amschwand took Family and Medical Leave Act leave on August 16, 1999, followed by disability leave, and never returned to work. He died on February 11, 2001.

Effective May 1, 2000, Spherion changed life insurance carriers. Basic and supplemental life insurance benefits under the Plan were insured through Group Policy No. GP-779407 (the "Policy"), which Spherion purchased from Aetna. Document No. 124 ex. A-1. The Policy contained an "Active Work Rule," which stated: "If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day." Document No. 124 ex. A-1 at A0000310. The Active Work Rule was also set forth in the "Summary of Coverage" (the "SPD") Aetna created for Spherion's employees. *Id.* ex. A-2 at A0000146 ("If you happen to be ill or injured and away from work on the date your coverage would take effect, the coverage will not take effect until you return to full-time work for one full day.").[4] According to Plaintiff, Aetna and Spherion agreed that the Active Work Rule would be waived for certain employees identified by Spherion as not actively at work on the effective date of the Policy. Unfortunately, Spherion did not provide Mr. Amschwand's name to Aetna.

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[4] It is uncontroverted that Mr. Amscwhand requested but never received copies of the Policy and/or the SPD before his death.

In March, 2000, Spherion notified its employees, including Mr. Amschwand, that the "open enrollment" period during which Spherion employees could elect to participate in the Plan had commenced. *See* Document No. 133 ex. 11. Mr. Amschwand participated in open enrollment, purchasing basic and supplemental life insurance benefits, and in November, 2000, Spherion confirmed to him that he was enrolled in the Plan. *Id.* exs. 11; 41. Mr. Amschwand paid his monthly premium payments directly to Spherion up until his death. *Id.* exs . 15-18, 33-34. It is uncontroverted that Mr. Arnschwand was never informed that, pursuant to the terms of the Policy, his life insurance coverage under the Plan would not take effect until he returned to work for one full day.

After Mr. Amschwand's death, Plaintiff filed a claim for life insurance benefits with Aetna, which Aetna denied on the ground that Mr. Amschwand had not satisfied the Active Work Rule inasmuch as he never returned to work for at least one full day between May 1, 2000, when the Policy became effective, and the date of his death on February 11, 2001. Hence, he never became eligible either for basic or supplemental life insurance coverage under the Policy. *See id.* exs. A-3, A-4. After unsuccessfully challenging the denial of benefits through Aetna's administrative appeals process, Plaintiff filed this action against the Spherion Defendants pursuant to ERISA § 502 (a) (3), 29 U.S.C. § 1132 (a)(1)(3).[5]

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[5] Plaintiff claims for statutory penalties and attorney's fees under ERISA § 502(c) (1) (B) and (g) (1) are not at issue here.

In her Sixth Amended Complaint, Plaintiff alleges that Spherion and the Trustees, as Plan Administrators, breached their fiduciary duties by providing to Plaintiff and her husband false information about the terms and status of his life insurance coverage under the Plan. According to Plaintiff, Defendants affirmatively represented to Mr. Amschwand that his death benefits were in place and would be payable to Plaintiff in the event of his death, but neglected to advise him that his coverage under the Plan would not be effective until he returned to work for one full day. Document No. 104 ¶¶ 47-48, 55-56. In addition, Plaintiff alleges that despite numerous requests, Defendants failed to provide her and her husband with copies of the Plan documents that would have alerted them to the Plan's terms for coverage, including the Active Work Rule. *Id.* ¶¶ 51-53, 58-60. Plaintiff therefore seeks (1) an award of "$426,000 (the value of the life insurance benefits) from Spherion," representing the "monetary losses caused by [the Spherion Defendants'] breach of fiduciary duty"; (2) statutory damages in the amount of $100 per day from the date of Spherion's "failure or refusal to send the documents requested by Plaintiff"; and (3) injunctive relief prohibiting Spherion from "following the express terms of any plan documents which are inconsistent with the affirmative representations Spherion made to the Amschwands about the terms of Mr. Amschwand' s life insurance proceeds." *Id.* ¶¶ 49-51, 57-58. Plaintiff also requests pre- and post-judgment interest, attorney's fees, and costs.

Defendants move for partial summary judgment that money damages are not available under ERISA

§ 502(a)(3), which provides only for "appropriate equitable relief." 29 U. S. C. § 1132(a)(3). In response, Plaintiff cross-moves for partial summary judgment that "equitable relief" within the meaning of ERISA § 502(a)(3) includes recovery from a fiduciary any monetary losses caused by the fiduciary's breach of its duties. Finally, Aetna moves for summary judgment on the Third-Party Complaint on the grounds that it is not liable to Defendants for their alleged misrepresentations and omissions concerning the terms for life insurance coverage under the Plan.

II. *Standard of Review*

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interroga-tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party must "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See id.* at 2553-54. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514-15 (1986)). "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine'

issue concerning every essential component of its case." *Id.*

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *See Anderson*, 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, (5th Cir. 1993) (citing *Matsushita*, 106 S. Ct. at 1351). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.* (citing *Anderson*, 106 S. Ct. at 2511). Even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson*, 106 S. Ct. at 2513.

III. *Discussion*

A. *"Appropriate Equitable Relief" Under ERISA § 502(a)(3)*

Section 502(a)(3) of ERISA authorizes a beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate *equitable relief* (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan."

29 U. S. C. § 1132 (a) (3) (emphasis added). According to the Spherion Defendants, the remedies sought by Plaintiff--the value of the life insurance benefits she would have received under the Plan had her husband complied with the Active Work Rule and/or an injunction prohibiting Defendants from applying the Active Work Rule to deny her the proceeds of the insurance policy--are not "equitable relief" and are therefore not recoverable under ERISA § 502(a)(3). *See* Document No. 129 at 4-13.[6]

Although ERISA does not define "equitable relief," the Supreme Court has considered the meaning of the term on two occasions. In *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), participants in a qualified pension plan brought suit under ERISA § 502(a)(3) against a non-fiduciary to recover losses resulting from the non-fiduciary's participation in an alleged fiduciary breach. *Mertens*, 113 S. Ct. at 2065-66. The participants attempted to characterize the relief they sought as "equitable relief," but the Court rejected that argument, noting that the participants were not seeking "a remedy traditionally viewed as 'equitable,' such as injunction or restitution." *Id.* at 2068. The Court determined that

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[6] Defendants also argue that ERISA § 502(a) (3) does not provide recovery for the "liquidated damages" Plaintiff mentions in her prayer for relief. *See* Document Nos. 104 at 20; 129 at 13. The only reference in ERISA to "liquidated damages" appears in ERISA § 502(g)(2)(C)(ii), and the Court agrees that this provision does not apply in this suit. *See* 29 U.S.C. § 1132(g)(2)(C)(ii). Plaintiff does, however, assert a claim for *statutory* damages under ERISA § 502(c)(1)(B), and Plaintiff presumably used the term liquidated damages when referring to this claim.

although the participants "often dance around the word, what [they] in fact seek is nothing other than compensatory damages--monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." *Id.* Because "[m]oney damages are, of course, the classic form of legal relief," the Court held that the participants were not entitled to recover the relief they sought under ERISA § 502(a)(3). *Id.*

The Supreme Court further clarified the meaning of "appropriate equitable relief" in *Great-West Life & Annuity Insurance Company v. Knudson*, 122 S. Ct. 708 (2002). In *Great-West*, the plan administrator brought suit under ERISA § 502(a)(3) to enforce a reimbursement provision in the plan against a plan beneficiary who had received compensatory damages in a lawsuit after being severely injured in a car accident. *Great-West*, 122 S. Ct. at 711.

In rejecting the administrator's claim, the Court reiterated that "the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were *typically* available in equity . . . .'" *Id.* at 712 (quoting *Mertens*, 113 S. Ct. at 2069). Although the administrator requested injunctive relief, the Court concluded that an injunction ordering reimbursement would not constitute "equitable relief" because "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Id.* at 713. The Court also rejected the administrator's request for restitution. The Court distinguished between legal and equitable forms of restitution and explained that in equity, restitution

was available only "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 714. Because the kind of restitution the administrator sought was not "equitable--the imposition of a constructive trust or equitable lien on particular property--but legal--the imposition of personal liability for the benefits" that the administrator had conferred on the beneficiary--the Court concluded that the "suit [was] not authorized by § 502(a)(3)." *Id.* at 715, 717. Finally, the Court expressly rejected the proposition that "the common law of trusts" provided the administrator with equitable remedies that allowed it to bring suit under ERISA § 502(a)(3). *Id.* at 717-18.

The Spherion Defendants argue that *Mertens* and *Great-West* "make clear that only strictly equitable relief is available under 502(a)(3)" and therefore preclude Plaintiff from recovering the proceeds of the life insurance policy under ERISA § 502(a)(3). *See* Document No. 129 at 7. In response, Plaintiff attempts to distinguish *Mertens* and *Great-West* on the grounds that they dealt with claims for monetary relief against *non-fiduciaries*. *See* Document No. 131 at 17-30. According to Plaintiff, "because the relief [she] seeks is against a fiduciary, it was exclusively available in equity and treated as equitable by standard texts on remedies and trusts." *Id.* at 17-18. Thus, Plaintiff argues, the term "equitable relief" includes "the recovery from a fiduciary of any direct monetary losses caused by the fiduciary's breach of its duties." *Id.* at 16. This is precisely the argument that the United States Secretary of Labor advanced, and the Tenth Circuit Court of Appeals rejected, in *Callery*

v. United States Life Ins. Co., 392 F.3d 401 (10th Cir. 2004).[7]

In Callery, plaintiff purchased life insurance coverage for her husband pursuant to a group insurance policy sponsored by her employer. *Callery*, 392 F.3d at 403. Although she and her husband later divorced, plaintiff continued to pay life insurance premiums for her husband's coverage until his death. *Id.* When plaintiff, as beneficiary, filed a claim for benefits under the plan, however, the insurance company denied coverage based upon a policy exclusion providing for termination of a spouse's eligibility for life insurance upon divorce, but refunded the premiums plaintiff had paid. *Id.* Thereafter, Plaintiff sued her employer under ERISA § 502(a)(3), alleging that the employer breached its fiduciary duties by failing to provide her with a copy of the summary plan description, which would have alerted her to the policy exclusion. *Id.* To remedy the breach, plaintiff sought an order enjoining her employer from not paying the life insurance benefits and/or an order estopping her employer from denying her claim for benefits. *Id.* at 405.

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[7] In fact, as Defendants point out, Plaintiff's motion for summary judgment is almost entirely a verbatim copy of the *amicus curae* brief filed by the Secretary of Labor in *Callery*, altered only by the substitution of Plaintiff's name for Callery's name. *Compare* Document No. 131 at 16-30 *with* Document No. 139 ex. A at 4-23. Nowhere in Plaintiff's motion for summary judgment, however, does she attribute her arguments to the Secretary of Labor's *amicus* brief.

Applying *Mertens* and *Great-West*, the Tenth Circuit concluded that "[t]o the extent [the plaintiff] seeks payment of the policy proceeds, such relief is barred under § 502(a)(3)," and "[t]o the extent she seeks injunctive relief compelling the payment of policy proceeds, [she] has dismissed the insurance company from the case and has not alleged that her situation satisfies the limitations placed upon the grant of injunctive relief in equity." *Id.* The Court explained that the plaintiff's claim "was most accurately construed as one for reliance damages, because she claims that the lack of notice prevented her from obtaining life insurance on her former husband from another source," but stated that "such relief is compensatory and not typically available in equity." *Id.* at 405-06; *see also Kishter v. Principal Life Ins. Co.*, 186 F. Supp. 2d 438, 446 (S.D.N.Y. 2002) ("[W]hat plaintiff seeks is an individualized recovery of at least some part of the [life insurance benefits] he lost because [the employer] did not provide the [insured employee] with complete and accurate information about her life insurance policy. . . . However, there is no equitable remedy available under ERISA § 502(a)(3) that can make plaintiff whole under these circumstances.").

In addition, the Tenth Circuit rejected the position urged by the Secretary of Labor in its amicus brief--"that the limited availability of monetary damages in *Mertens* and *Great-West* is inapplicable in this case because those cases involved contract breaches by non-fiduciaries, rather than a claim against a fiduciary for a fiduciary breach." *Id.* at 408. The Court explained that "[w]hile the arguments of amici that we should look to the common law of trusts

and award monetary damages pursuant to an equitable breach of trust by a fiduciary may have been compelling before *Great-West*, they are not so now," and noted that "other courts have rejected [a] distinction . . . based on the status of the defendant as a fiduciary." *See id.* (citing *Rego v. Westvaco Corp.*, 319 F.3d 140, 144-46 (4th Cir. 2003); *McLeod v. Or. Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996)). Thus, the Tenth Circuit stated, "[t]hough the issue is close, we must adhere to the Supreme Court's rather emphatic guidance and therefore conclude that in a suit by a beneficiary against a fiduciary, the beneficiary may not be awarded compensatory damages as 'appropriate equitable relief' under § 502(a)(3) of ERISA." *Callery*, 392 F.3d at 409.

Callery is persuasive for the proposition that monetary damages equal to the benefits a beneficiary would have received but for the fiduciary's breach do not constitute "equitable relief" and are therefore unavailable under ERISA § 502(a)(3). The alleged fiduciary breach by the Spherion Defendants, therefore, does not subject them to liability to Plaintiff for damages measured by the value of the life insurance proceeds not paid by Aetna. Moreover, Plaintiff is not entitled to an order enjoining the Spherion Defendants "from affirmatively relying upon the Active Work Rule" to deny her the proceeds of the Aetna Policy; it was Aetna, not the Spherion Defendants, who determined that the Active Work Rule precluded Plaintiff from receiving benefits under the Plan. Such an injunction, therefore, would have no effect against the Spherion Defendants without an accompanying order requiring them to pay to Plaintiff the disputed life insurance proceeds. This request for

an injunction is simply an indirect attempt to recover from Defendants what she cannot recover directly--the value of the life insurance proceeds. Plaintiff cannot obtain the relief she seeks under ERISA § 502(a)(3), and her § 502(a)(3) claim must therefore be dismissed.[8]

B. *Aetna's Liability to the Spherion Defendants*

Aetna moves for summary judgment on the Third-Party Complaint. In response, Defendants contend that because Plaintiff seeks $426,000 in life insurance benefits, she has brought a claim for benefits under ERISA § 502(a)(1)(B); and although Defendants agree with Aetna that Plaintiff is not entitled to recover these benefits under the express terms of the Plan, to the extent the Court holds that she is entitled to recover these amounts from Defendants, "Defendants would have a claim against Aetna for reimbursement of those fully insured benefits." *See* Document No. 138 at 2-4.[9] The third party action against Aetna is mooted by the summary judgment granted herein for Defendants on Plaintiff's claim. Aetna's motion for summary judgment will therefore be granted.

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[8] Because Plaintiff as a matter of law cannot obtain the relief requested under ERISA § 503(a)(3), her further contention that the Spherion Defendants somehow waived the Active Work Rule contained in Aetna's Policy has no merit.

[9] Plaintiff did not assert a claim for benefits under ERISA § 502(a)(1)(B) but under § 502(a)(3). *See* Document No. 104.

IV. *Order*

For the foregoing reasons, it is

ORDERED that Defendants Spherion Corporation's, Trustees of the Interim Health Benefits Trust's, and the Group Life and Accidental Dismemberment Insurance Plan's Motion for Partial Summary Judgment (Document No. 127) is GRANTED, and Plaintiff Melissa Amschwand's ERISA § 502(a)(3) claim against the Spherion Defendants is DISMISSED. The Spherion Defendants' Motion to Strike (Document No. 140) is DENIED AS MOOT. It is further

ORDERED that Plaintiff Melissa Amschwand's [Cross] Motion for Partial Summary Judgment (Document No. 131) is DENIED. It is further

ORDERED that Third-Party Defendant Aetna Life Insurance Company's Motion for Summary Judgment on Third-Party Complaint (Document No. 124) is GRANTED, and the Spherion Defendants' Third-Party Complaint is DISMISSED.

Remaining to be tried are Plaintiff's claims for statutory penalties and attorney's fees under ERISA Sections 502(a)(1)(A) and (g)(1).

The Clerk shall notify all parties and provide them with a signed copy of this Order.

SIGNED at Houston, Texas, on this 24th day of August, 2005.

/s/

EWING WERLEIN, JR.
UNITED STATES DISTRICT COURT

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20346

[Filed October 18, 2007]

MELISSA AMSCHWAND, individually and on behalf of the Estate of Thomas Amschwand Plaintiff-Appellant	)
v.	)
SPHERION CORP; ET AL Defendants	)
SPHERION CORP, individually and as plan administrator of the group plan life policies 779407-10-001 & 779407-11-001; GROUP PLAN LIFE POLICIES, 779407-10-001 & 779407-11-001; TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN;	)

GROUP LIFE AND ACCIDENTAL)
DEATH AND DISMEMBERMENT)
INSURANCE PLAN)
Defendants-Appellees)
)

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before JONES, Chief Judge, and BENAVIDES and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/Edith H. Jones
United States Circuit Judge

REHG-2

APPENDIX F

STATUTES

29 U.S.C. § 1132

United States Code Annotated Currentness
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle 8. Regulatory Provisions
Part 5. Administration and Enforcement
§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought-

(1) by a participant or beneficiary-.

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), or (8) of subsection (c) of this section or under subsection (i) or (I) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates

subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[10] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan

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[10] So in original. Probably should be "subtitle".

in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), oniy if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by

regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (5) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days

after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or 1082(b)(7)(F)(vi) of this title, or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary

shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State

law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a

final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial

proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

APPENDIX G

UNITED STATES SUPREME COURT

Case 06-856

LARUE V. DEWOLFF,
BOBERG & ASSOC., INC.

[Certiorari Granted June 18, 2007]

DECISION BELOW:450 F3d 570

LOWER COURT CASE NUMBER: 05-1756

QUESTIONS PRESENTED:

1. Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1132(a)(2), provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title." 29 U.S.C. 1109 states that "a fiduciary with respect to a plan who breaches any * * * duties imposed upon fiduciaries * * * shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."

The First Question Presented is:
Does §502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account

in a "defined contribution plan" that were caused by fiduciary breach?[1]

2. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that a "civil action may be brought * * * by a participant * * * to obtain other appropriate equitable relief * * to redress * * * violations" of the statute.

The Second Question Presented is:
Does §502(a)(3) permit a participant to bring an action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in premerger courts of equity as "surcharge")?[2]

CERT. GRANTED 6/18/2007

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[1] Hereinafter, this will be referred to as the "502(a)(2) Question."

[2] Hereinafter, this will be referred to as the " 502(a)(3) Question."